



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**Pittsfield Town Employees, AFT Local #6214, AFT-NH, AFL-CIO**

**v.**

**Town of Pittsfield, Board of Selectmen**

**Case No. G-0060-8**  
**Decision No. 2012-278**

**Appearances:**

Terri D. Donovan, Esq., for the Complainant

Paul T. Fitzgerald, Esq., for the Respondent

**Background:**

The Union filed an unfair labor practice complaint on May 9, 2012 and amended it on June 6 and July 11, 2012. In Count I of its complain, the Union claims that the Town violated RSA 273-A:5, I (e), (g), (h), and (i) when it unilaterally prohibited "scheduled" overtime and private details, changed the manner in which open shifts are filled, and changed the work schedule for employees of Ambulance and Police Departments. In Count II, the Union claims that the Town violated RSA 273-A:5, I (a) when it issued a policy restraining bargaining unit employees' communication with the public. The Union requests, inter alia, that the PELRB find that the Town committed an unfair labor practice and order the Town to compensate all employees for wages lost due to the improper assignment of shifts and work details, to rescind Directive provisions at issue, to comply with the collective bargaining agreement (CBA), and to cease and desist from interfering with the employees' free speech rights and from making changes to working conditions without negotiating with the Union.

The Town denies the charges and asserts that its actions were a proper exercise of management rights under the CBA and that the issue involving employees' free speech rights is

moot because the Town rescinded its "communication policy." The Town requests that the PELRB dismiss the complaint and/or deny all relief sought by the Union.

The parties appeared for an adjudicatory hearing at the PELRB offices in Concord on July 10, 2012. Prior to commencement of the hearing, the parties agreed to submit this case for decision based on affidavits, exhibits, and briefs.

### **Finding of Fact**

1. The Town is the public employer within the meaning of RSA 273-A:1, X.
2. The Union is the exclusive bargaining representative for all full time and part time employees in the following positions as certified by the PELRB on October 10, 2002: Administrative Assistant, Office Assistant, Building Inspector, Welfare Director, Ambulance Director, Assistant Ambulance Director, Paramedic, Emergency Medical Technician Intermediate, Emergency Medical Technician, Superintendent of Public Works, Assistant Superintendent of Public Works, Public Works Equipment Operator, Public Works Department Laborer, Public Works Light Equipment Operator, Waste Water Facility Superintendent, Waste Water Facility Chief Operator, Waste Water Operator, Chief of Police, Police Lieutenant, and Police Sergeant. See PELRB Decision No. 2003-042. Town's Police Department Patrolmen are in the bargaining unit represented by the Teamsters.
3. The Union and the Town are parties to a CBA effective from January 1, 2011 through December 31, 2012. See Joint Exhibit 1.
4. ~~The negotiations on this CBA, including the subjects of overtime and police details, were lengthy and were assisted by a mediator over several sessions.~~
5. The Town budget form for the period from January 1, 2012 to December 31, 2012 was posted with the warrant on February 23, 2012 and listed recommended Selectmen's appropriations for ensuing fiscal year at \$3,670,940. Article 11 concerning the CBA between the Union and the Town was listed as an individual warrant article and indicated that Selectmen and

Budget Committee recommended appropriations in the amount of \$17,765. See Town Exhibit B.

6. During the March 13, 2012 Annual Town Election Selectmen Vien and Hast lost to Larry Konopka and Linda Small. Mr. Konopka and Ms. Small were sworn in as new Selectmen after the Town Meeting on March 17, 2012. See Union Exhibit 46.

7. At the March 17, 2012 Town Meeting voters were presented with Warrant Article 11 which provides as follows:

To see if the town will vote to approve the cost items included in the collective bargaining agreement reached between the Board of Selectmen and AFT-NH, Local 6214, which calls for the following increase in salaries and benefits at the current staffing level:

2011 No Signed Contract Extension

2012 \$17,765.47

2013 \$4,734.00

And further to raise and appropriate the sum of \$17,765.47 for the current fiscal year, such sum representing the additional costs attributable to the increase in salaries and benefits required by the agreement over those that would be paid at current staffing levels. (Estimated gross tax impact \$.07) (Recommended by the Board of Selectmen 4-0-0) (Recommended by the Budget Committee 8-1-0).

See Union Exhibit 46, page 7.

8. At the March 17, 2012 Town Meeting, Selectman Vien explained that the bargaining unit members agreed to an 85%/15% split in health insurance premiums in the proposed contract, in lieu of the previous 90%/10% split. Selectman Vien also explained to the Town Meeting attendees that a "yes vote on warrant article #11 will allow for the budget article #30 to be reduced between \$22,794.00 and \$20,501.00, in essence offsetting the 2012 year costs in article #11." He stated that a "no vote on warrant article #11 will not result in any reduction to budget article #30." Selectmen Vien also explained that there will be no salary increases in 2012 and 2013 and there were none in 2011 as there was no contract. Selectman Vien moved to accept Article 11 as read. Town Meeting voters passed Warrant Article 11 as presented. See Union Exhibit 46.

9. Town Meeting voters passed Warrant Article 12 which contained cost items of the CBA reached between the Board of Selectmen (BOS) and the Teamsters, Local 633 representing

Police Department patrolmen.

10. Warrant Articles 18, 19, and 20 proposed to appropriate necessary sums to continue the employment of a police officer, an EMT in the Ambulance Department, and an employee in the Highway Department, respectively. The amounts appropriated would be added to the 2012 Town budget. During the discussion of these articles, Linda Small stated that there were "ways to tighten up the budget and make it more efficient without eliminating positions that might not be beneficial to the town." Ms. Small suggested that if the articles were voted in, she would propose an amendment to Article 30 to cut operating budget by the amount proposed in three articles - \$125,138. Selectmen Vien responded that "he hopes that the articles are voted in and that there is nothing more to take out of the budget. These articles are separated out to show that there is not enough to cut and still operate the town efficiently." Articles 18, 19, and 20 passed. See Union Exhibit 46, pages 11-13.

11. Warrant Article 30 proposed to raise and appropriate \$3,622,440 to fund the Town budget. Ms. Small moved to amend Article 30 by decreasing the total sum recommended by \$125,138, reducing the amount to \$3,397,302. This figure did not include the sums contained in special or individual articles, such as Warrant Article 11 (CBA). The amendment passed and Article 30 was passed as amended. See Union Exhibit 46, pages 15 & 16.

12. The Town's Report of Appropriations Actually Voted on March 17, 2012 provides that \$844,930 was appropriated for Police (warrant articles 11, 12, 18, and 30) and \$514,111 was appropriated for Ambulance (warrant articles 11, 19, 29, and 30). The total voted appropriations were \$3,858,685. See Town Exhibit C.

13. The Town budget includes line items which fund the operations of the Town departments, including the Police and Ambulance. Selectmen have discretion to transfer funds between individual lines in the budget.

14. Article 3 of the parties' CBA, titled Management Rights, provides in part as

follows:

The Town hereby retains and reserves to itself all powers, right, authority, duties and responsibilities conferred upon and vested in it by the Constitution, laws and regulations of the State of New Hampshire and the United States. Further, all rights which ordinarily vest in and are exercised by public employers remain vested in the Town unless otherwise modified by this Agreement. The Town retains the right to justly exercise managerial policy within its exclusive prerogative to manage its affairs efficiently and economically including, but not limited to, the use of technology, organization structure, selection, assignment, number, direction and discipline of its personnel. Further, *the Town retains the right to adopt, change, enforce or discontinue any rules, regulations, procedures, policies, ordinances and law not in direct conflict with any provision of this Agreement, or existing applicable statutory laws as delineated under the New Hampshire Revised Statutes Annotated or the United States Code*, so as to continue public control of Departments, Boards, Commissions, Committees, Agencies and Employees of the Town of Pittsfield.

See Joint Exhibit 1 (emphasis added).

15. Article 9, titled Work Rules, provides as follows:

The Town shall have the power to prepare, issue and enforce ordinances, rules and regulations, orders (general and special, written and oral), Standard Operation Procedures (SOP's), and safety rules and regulations that are necessary for the safe, orderly, cost effective, and efficient operation of the Town and its various Departments and *which are not inconsistent with this Agreement*. Copies of all such materials shall be posted in all Departments to which they relate at least 10 calendar days before they become effective except in the case of Ordinances that become upon passage [sic] that shall be posted within forty-eight hours of enactment. The Union shall be provided copies of all such materials.

See Joint Exhibit 1 (emphasis added).

16. Article 11 of the CBA sets forth the following 4-step grievance procedure: (1) Supervisor, (2) Department Head, (3) the Board of Selectmen (BOS), and (4) filing of an unfair labor practice complaint with the PELRB. See Joint Exhibit 1.

17. Article 12 of the CBA, titled Wages, provides in part as follows:

All employees identified in the Collective Bargaining Unit recognition clause of this agreement who are employees of the town shall be eligible for wage adjustments in accordance with the attached step plans. No employee shall be granted a step increase for the duration of this agreement. The wage calculations are separate from this agreement.

The same wage schedule (2010-11) will be in effect from 1/1/11 to the end of the term of this agreement, or until a successor agreement is negotiated.

The Appendix C-1 of the CBA contains the 2011-2013 wage schedule for bargaining unit

employees. See Joint Exhibit 1.

18. Article 13 of the CBA, titled Hours of Work, provides in part as follows:

Section 1. General. This Article is intended to define the normal hours of work per day or per week in effect at the time of the acceptance of this Agreement. All full time Employees shall normally be scheduled to work 40 hours per weekly pay period... Employees assigned to work from Saturday evening to Sunday morning may have less hours in their normal work week, in one week, and more hours in the following week, all of which shall be paid at the straight time rate established in the Agreement. *Nothing contained therein shall be construed as preventing or limiting the Town from restructuring, revising, rescheduling, reassigning or otherwise changing the work day or work week for the purposes of promoting efficiency and effectiveness, meeting the needs of public safety, promoting the public welfare, limiting costs and expenses, and administering to the need of the community during periods of public emergency.*

Section 2. Hours of Work. The hours of work of the various Departments of the Town shall be determined by the Department head with the approval of the Town Administrator. The normal workday shall be eight (8) hours which shall be interrupted at its mid-point with either a thirty (30) minute or a sixty (60) minute unpaid meal period. The Union shall be notified of any changes in the hours of work under this Section.

Section 3. Police Department. The hours of work of the Police Department shall be scheduled by the Chief of Police after approval from the Town Administrator. All eligible Employees under the Police Department will be provided a thirty (30) minute paid meal period during their work shift...

Section 4. Ambulance Department. The hours of work of the Ambulance Department shall be scheduled by the Ambulance Director after approval from the Town Administrator. The normal workday may vary from eight (8) hour shifts to sixteen (16) hour shifts and from a forty (40) hour workweek to a forty-eight (48) hour workweek at straight time...

See Joint Exhibit 1 (emphasis added).

19. The words "Ambulance Director" in the CBA refer to the Fire Chief. Some of the Ambulance Director's duties can be and have been delegated to the Assistant Ambulance Director.

20. Article 14, titled Ambulance Department, provides in part as follows:

Section 1. Department. ...The Employees of the Department report to the Fire Chief, the Town Administrator and the Board of Selectmen in all areas of responsibility under this Agreement including wages, hours of work and all their conditions of employment.

Section 2. 48-Hour Work Week. The Department may be changed to a forty-eight (48) hour regular workweek after consultation between the Union and the Town. In such case, the full time Employees of the Department would be paid for overtime on the basis of all hours worked in excess of forty-eight (48) hours instead of in excess of forty (40) hours

worked.

Section 3. Conditions of Employment. The Town will not change any of the conditions of employment for the Department contained within this Agreement except as are specifically contained herein.

See Joint Exhibit 1.

21. Article 16, titled Overtime, provides in part as follows:

Section 1. Overtime. Employees covered under this Agreement shall be paid for overtime work at a rate equal to time and one-half their regular rates of pay for all work in excess of 40 hours per week except for members of the Police Department, Ambulance Department and salaried Employees.

Section 2. Police Department. Police Department Sergeants covered under this Agreement shall be paid for overtime work at a rate equal to time and one-half their regular rates of pay for all work in excess of forty-three (43) hours per week. Other Police Department Employees covered under this Agreement at the time of its approval are salaried Employees and do not receive overtime.

Section 3. Ambulance Department. Ambulance Department EMT's, EMT-I's, Paramedics and the Assistant Director shall be paid for overtime work at a rate equal to time and one-half their regular rates of pay for all work in excess of forty (40) hours per week when these Employees are assigned to a forty (40) hour work week. When Ambulance Department Employees are assigned to a forty-eight (48) hour workweek overtime will be paid after forty-eight (48) hours of work in that workweek. The Ambulance Director is a salaried Employee and does not receive overtime.

Section 4. Salaried Employees. Employees in the positions of Chief of Police, Police Lieutenant, Superintendent of Public Works, Ambulance Director, Superintendent of Waste Water, Building Inspector, Welfare Director and the Administrative Assistants are salaried Employees and do not receive overtime for work in excess of the normal work week... [S]uch employees may be required to work hours in excess of 40 hours per week or days other than Monday through Friday...

Section 5. Police Paid Details. Police Department Employees, including salaried Employees, shall be paid for police paid details at the rate established by the Board of Selectmen, but not less than \$22.00 per hour for all work performed and such payment shall be tendered as a part of the Employees regular weekly payroll following the submission of approved time sheets.

Section 6. Seniority. Overtime shall be offered on a rotating basis by seniority by Department. When the need arises for additional Employees and the Town has exhausted the seniority list within a Department, the Town may utilize the general seniority list of employees capable of performing the work or if there are no such Employees the Town may hire temporary help that is qualified to perform the work. The determination of who is qualified to perform the work on the general seniority list shall be between the Department Head requesting the work and the Town Administrator.

Section 7. Hours Worked. Employees covered by this agreement shall be paid overtime in excess of hours actually worked in any scheduled workweek (e.g. 40, 43, or 48 hours)...

See Joint Exhibit 1. Temporary and on call part time/per diem employees are not on departmental or general seniority lists.

22. Article 18, titled Attendance Required, provides in part that “[e]mployees are required to remain at work for the entire work period unless authorized by their Department Head and/or the Town Administrator to leave for an excused absence.” See Joint Exhibit 1.

23. Article 31, titled Health and Life Insurance, provides in part as follows:

The Town will pay 90% of the monthly insurance cost for health insurance and the Employee shall pay 10% of such monthly costs and such rates shall remain in effect until changes by the carrier...

Effective April 1, 2012

For employees hired on or before April 1, 2012, the Town will pay 85% of the monthly insurance cost for the health insurance plan enumerated in Appendix B and the Employee shall pay 15% of such monthly costs and such rates shall remain in effect until changed by the carrier...

See Joint Exhibit 1.

24. The newly elected BOS conducted its first meeting on March 20, 2012. At that meeting the BOS approved a Directive, effective March 21, 2012, regarding the assignment of overtime and police details for bargaining unit employees. See Union Exhibit 37. On March 21, 2012 Town Administrator Paul Skowron sent to the department heads a letter containing the BOS Directive, which provides as follows:

1. All discretionary expenditures are suspended. Non-discretionary expenditures may include such items as utility bills, private vendor contracts, major vehicle repairs, etc. Requests for non-discretionary expenditures should be placed in writing and directed to me for disposition. An email is satisfactory.

2. There shall be no "scheduled" overtime. Those work shifts for which an employee is not scheduled to work for reasons such as vacation leave, sick leave, bereavement leave, etc., [sic] the shift shall only be filled by a part time or per diem employee. Examples of allowable overtime include court appearances for police officers, emergency responses from police and fire that will bridge a shift, snow plowing events, etc.

3. The Police Chief is prohibited from allowing town of Pittsfield sworn police officers from accepting special detail assignments in the town of Pittsfield. Any special detail

request, or circumstance, shall only be filled by a sworn police officer from another community.

4. There shall be no filling of vacant positions without the consent of the Board of Selectmen. This includes any position, including part time, which may result in any expense to the town, for reasons such as training, clothing, etc.

See Union Exhibit 1. "Scheduled" overtime is often created when a shift, or a part thereof, opens up due to a previously scheduled vacation, sick or other leave.

25. Although the BOS Directive prohibits only "scheduled," as opposed to emergency, overtime, in practice the department heads now have no discretion to schedule any overtime. Even in emergency situations, full time employees may be allowed to work overtime only if no part time/per diem employees are available *and* the Town Administrator and/or the Chairman of the BOS has given prior approval. For example, on March 27, 2012 the Police Chief was out of State at a conference and Sergeant Jeffrey Cain was in charge of the Police Department when a midnight shift officer called in sick. After unsuccessfully attempting to fill the shift with a part time officer and then contacting the Town Administrator, as required under the BOS Directive, Sgt. Cain was instructed by the Town Administrator that he was not authorized to fill the vacant shift with a full time employee working overtime. He was instructed to close the doors of the Police station when the evening shift ended.

26. In the past, shifts that opened up because of the scheduled or unscheduled vacation, sick leave or other absence have been regularly filled by offering those shifts to full time bargaining unit employees first. Only if no full time employees were available, the open shifts were offered to part time/per diem employees. The Town administration and the BOS were aware of this arrangement.

27. During the negotiations on the latest CBA, the Town's representatives did not mention that they planned to prohibit details and/or overtime. When the Union members approved the CBA, which included (1) a 5% increase in employee health insurance contribution, (2) no cost of living increases (COLA) for 3 years, and (3) no step increases, they relied on the availability of

overtime and details. Overtime and details pay have always been treated as part of employees' wages. The Union members would not agree to the contract terms if they knew that, after town voters approve the agreement, the BOS would prohibit any details and overtime.

28. Based on the amount of patrol shifts that have been staffed by part time officers or the Police Chief, who is a salaried employee, between March 21, 2012 and July 1, 2012, two Police Sergeants (bargaining unit employees) have lost approximately \$2940.00 in overtime pay.

29. Robert Wharem is the full time Police Chief and has been employed as the Chief since 1998. Gary Johnson is the former Fire Chief for the Town. He has been employed in this position from December 2006 till his resignation on May 18, 2012. The Fire Chief is responsible for the administration of the Ambulance Department. According to Police Chief Wharem and Fire Chief Johnson, Article 16 of the CBA requires that any open shifts be offered to full time employees first and only if no full time employee is available, an open shift can be offered to a part time/per diem employee. Open shifts have been assigned in this manner for at least last five years.

30. Jennifer Tedcastle is the Assistant Ambulance Director for the Town. She has been employed by the Town since 1998. Since 2005, Ms. Tedcastle has been responsible for shift scheduling and day to day operations of the Ambulance Department. She has been a member of the Union negotiating team for previous contracts. According to Ms. Tedcastle, the open shifts caused by an employee absence or any other reason have always been offered first to full time bargaining unit employees and then to part time/per diem employees if no full time employees were available. If, during negotiations on the latest CBA, Ms. Tedcastle were aware of the BOS's plans to prohibit overtime and change Ambulance Department work schedule, she would not have voted to ratify the CBA.

31. According to Ms. Tedcastle, prohibition on use of overtime makes it difficult to fill shifts because part time/per diem employees are often not available to fill open shifts. As a result

of the Directive regarding overtime, the Ambulance Department was left without coverage by employees for a period of about 8 hours at least once. The Directive regarding overtime undermined the Ambulance Department staff's ability to provide 24/7 coverage and resulted in a loss of employees' wages.

32. Karen Brown is a full time Paramedic with the Town Ambulance Department. The Directive prohibiting overtime resulted in a loss of her wages.

33. Lyle Deane has been a full time Emergency Medical Technician with the Town since 2008. On March 29, 2012, Mr. Deane was denied an opportunity to work two hours of overtime which resulted in a loss of his income, a shift being unfilled, and the Town being left without a transporting ambulance. Mr. Deane considers overtime pay a part of his annual wages. He and other Ambulance Department employees lost wages because they were denied opportunity to work overtime shifts.

34. The Town has a policy that requires vendors, such as a public service company or a phone company, to hire details when they are working on a project on the streets and roadways of the Town.

35. In the fiscal year 2012, the individual line item concerning police paid details was set by the BOS at \$1 in the final budget. In the fiscal year 2011, the amount budgeted for police details was \$15,000.00 at the time the budget was passed. In April, 2011 this amount was changed to \$1.00 on recommendation of the Town Administrator. Town Administrator Skowron recommended a transfer of \$14,999.00 from the police details line item into the police overtime line item rationalizing his recommendation as follows: "The current estimated expenditure in the Special Detail line items does not properly reflect the previous years' average expenditures. Because the Special Detail cost is fully reimbursable the logic for reducing the line item to \$1.00 is straightforward." After the BOS reduced the Police details line item amount to \$1.00 in 2011, Police Department employees continued to work, get paid for, details. See Reply Affidavit of

Robert Wharem.

36. In the past, Police Department employees, including Sergeants and the Chief, worked, and were paid for, details on regular basis and the Town administration and the BOS were aware of detail work being performed. Police detail work generated revenue for the Town. For example, in 2011 the Town had gross police detail revenue of \$79,614.28, which resulted in net revenue to the Town of \$23,198.81. Since the issuance of the Directive, the Town has received no revenue from police detail work.

37. At the March 17, 2012 Town Meeting, Selectman Small stated that “the special detail revenue helps significantly” and that in 2011 police details generated almost \$80,000 in gross revenue which could be used to offset taxes. See Union Exhibit 46, pages 8 & 9.

38. The detail pay rate for Police Sergeants and the Police Chief is the same as the detail pay rate set forth in the CBA between the Town and the Teamsters Union, which covers Police Department Patrolmen. At the March 17, 2012 Town Meeting Selectman Vien noted that “in negotiations the detail rate was increased by \$2.00 an hour.” See Union Exhibit 46, page 8.

39. The BOS Directive appears to ban only police details assignments in the Town of Pittsfield. In practice, the Town has not allowed the Police Department employees to work details in Pittsfield or elsewhere.

40. The police details in the Town of Pittsfield are still available and are currently performed by the police officers from other towns. The Pittsfield Police Department is required to do the administrative work to schedule and process the paperwork for details performed by officers from other towns. Chief Wharem and Police Sergeants are eligible to perform details and used to perform them on regular basis in the past, before the issuance of the Directive.

41. In 2011 full time Police Department employee, including employees represented by the Teamster and employees represented by the Complainant, were paid \$36,661.72 in detail wages. The prohibition on working details resulted in economic loss to the bargaining unit

members, including Sergeants and the Police Chief. Between March 21, 2011 and July 1, 2011 Sgt. Cain earned \$2536.00 working details; Chief Wharem earned \$1172.00; and Sgt. Walter earned \$264.00. All police detail assignments were performed during the officers' time off. In 2012 their income from detail work was \$0.

42. Based on detail requests the police department has received from private vendors during March 21, 2012 to July 1, 2012 time period, the Police Chief and two Sergeants lost approximately \$864 in detail wages. This number includes only documented detail requests in the Town of Pittsfield. It does not include requests for details from agencies in other jurisdictions, which the department has been unable to accept and which were not documented.

43. The Police Department has operated on four ten-hour days schedule since 1998.

44. As the department head, Police Chief Wharem has always been responsible for the day to day scheduling of the Police Department personnel. Chief Wharem believes that the four ten-hour days schedule serves the public safety needs of the community best and that it is the most cost efficient schedule for the Town.

45. On April 4, 2012 the Town Administrator sent a letter regarding employee shift schedules to Fire Chief Johnson and Police Chief Wharem, which provides in part as follows:

2. The Selectmen request that Chief Wharem prepare a shift schedule which replaces the current the [sic] 4 day 10 hour shift regiment with a 5 day 8 hour shift schedule. This schedule would apply to all sworn personnel. Please include the position currently vacated by Tanya Emerson in the proposal...

3. The Selectmen request that Chief Johnson prepare alternate shift schedules to the current 2 day 24 hour shift schedule. This should include 4 twelve's (12's), a 2 day 11 hour and 2 day 13 hour shift schedule. Consideration should also be given to providing for a possible "on call" payment for a full time, par time, or per diem person on the evening hour shift that would be staffed by 1 full time individual...

See Reply Affidavit of Robert Wharem.

46. According to Chief Wharem, the Town Administrator neither prepared nor recommended the schedule. The schedule was requested by the BOS. The Chief prepared the schedule as directed by the BOS but did not recommend it because, in his opinion, it was not a

workable schedule.

47. As reflected in the minutes of the April 10, 2012 BOS meeting, the BOS discussed changes in schedules of the Police and Ambulance Departments. During the discussion, Police Chief Wharem and Fire Chief Johnson objected to the changes proposed by the BOS on the grounds, among others, that the departments were understaffed and that new schedules were less efficient and would create a greater need for overtime. See Union Exhibit 40.

48. On April 10, 2012 the BOS directed the Police Chief to change the weekly work schedule from four ten-hour days to five eight-hour days against the Chief's recommendation to maintain the previous schedule. See Union Exhibits 40 & 48.

49. As the head of the Ambulance Department, Fire Chief Johnson, working in conjunction with the Assistant Ambulance Director, was always responsible for managing the day to day operation of the department and it was his responsibility to recommend the department schedule. Chief Johnson recommended the continuation of the two 24-hour days shift schedule the ambulance department had been using for the last several years. He contacted ambulance departments in other jurisdictions/municipalities while preparing his presentation for the BOS and determined that 24-hour shifts resulted in reduction of sick leave use and a higher moral in the organization.

50. The BOS changed the Ambulance Department schedule to four 12-hour days a week against the Fire Chief's recommendation.

51. The change in the Police and Ambulance Departments' schedules was intended to promote efficiency and cut the Town's costs and expenses.

52. The Ambulance Department employees have been on two 24-hour days schedule for at least last six years. The schedule change resulted in increase in the cost of commuting and child care and diminished the bargaining unit employees' income. It also caused financial hardship to employees by depriving them of a possibility to have a second job outside the

department.

53. On March 23, 2012 Ambulance Department employees filed a grievance regarding the assignment of open shifts and Lyle Deane filed a grievance regarding the denial of opportunity to work overtime with Fire Chief Johnson. The Chief denied both grievances on March 27, 2012 on the ground that they could not be resolved on the department head level because department heads had no authority to alter or change the BOS Directive. See Union Exhibits 3 & 6.

54. On March 27, 2012, the Union (Ms. Tedcastle and Sgt. Cain) filed a grievance with the Town Administrator and the BOS on behalf of the bargaining unit employees claiming that the Directive prohibiting overtime and police detail work violated Article 16 of the CBA and that the Town negotiated in bad faith. On March 27, 2012 Mr. Deane sent a grievance letter to the Town Administrator claiming that a two-hour overtime shift he has been scheduled to work was given to a per diem employee in violation of Article 16 of the CBA and past practice between the parties. See Union Exhibits 2 & 5.

55. A hearing on these grievances was held on April 14, 2012. On May 1, 2012 the BOS denied the grievances stating that Article 9 of the CBA allowed the Town "to establish certain procedures for the cost effectiveness of the department..." See Union Exhibits 4 & 7.

56. On May 10, 2012 Police Chief Wharem denied a grievance filed by Sgt. Walter regarding the change in schedule on the ground that on April 10, 2012 the BOS voted to experiment with the schedule for a period of two months by changing the schedule from ten-hours shifts to eight-hour shifts. The Union filed the grievance with the BOS claiming that directing Chief Wharem to change the Police Department work schedule to five eight-hour days a week violated Article 13 of the CBA and past practice. On June 1, 2012 the BOS denied this grievance. See Union Exhibits 11, 12 & 13.

57. On May 16, 2012 Kristen Ahern filed a grievance with the Town Administrator

and the BOS claiming that the BOS violated CBA Article 16 when it decided to fill an open Ambulance shift created by FMLA leave with a temporary full time employee. On June 1, 2012 the BOS denied the grievance. See Union Exhibits 9 & 10.

58. The BOS first discussed a "communications policy" at the meeting on March 20, 2012. A motion was made "that no letters should be published by Department Heads or Town employees without approval of Board." Selectman Small publicly read a statement concerning a collective bargaining employee's letter to the press and demanded an investigation. See Union Exhibit 37.

59. Police Sgt. Cain understood from the BOS statement made during the March 20, 2012 meeting that if a Town employee talked to the public or media about violations of the CBA, the BOS would take punitive actions against that employee. Similarly, Ms. Tedcastle understood from the Selectmen's statements at the meeting that any disagreement with the BOS could result in the loss of a job and that serious actions will be taken against employees who expressed their concerns regarding terms and conditions of employment publicly. Chief Wharem believes that the BOS prohibited any communication with the public or media starting March 20, 2012.

60. Although Ms. Tedcastle attended a BOS meeting on March 27, 2012, she did not speak because she was afraid of losing her job if she expressed her opinion. At that meeting, the BOS moved to not allow employees on duty to attend any meetings unless requested by the BOS. Ms. Tedcastle has not attended any meetings since that day.

61. On March 28, 2012 the Town Administrator issued the following memo to the Town employees:

At the direction of the Board of Selectmen I am communicating the members' heightened awareness of the state of the decorum at the public at [sic] meetings, specifically Selectmen's meetings. The Selectmen have noted less than civil conduct has been exhibited and will not be tolerated. It is imperative that if you are before the Board of Selectmen your department should be respectful of their position.

At times you may individually have a different opinion, or perspective, but it must be remembered that the members of the Board have been elected by the people of Pittsfield to

manage the affairs of the town. It is incumbent upon you to address the topic professionally, and respond accordingly.

See Union Exhibit 20.

62. The BOS members continued to discuss employee communication with the public and the BOS members during the meetings held after March 20, 2012.

63. On March 30, 2012 the Town Administrator sent the following letter to the department heads:

Please be advised that at the direction of the Board of Selectmen I wish to confirm what I verbalized at the recent department head meeting. Unless the Board of Selectmen has extended an invitation for you, and/or your staff, to attend a Board's meeting, there is no purpose to your presence.

The members of the Board believe that if you, and/or your staff, are on duty then your first obligation should be to attending to your job responsibilities.

Another memo directed all communications between the BOS and a department head to be "channeled through the Town Administrator." See Union Exhibits 17 & 18.

64. At the meeting on April 3, 2012, the BOS read into the record a Town employees' letter to the editor published in Concord Monitor and Suncook Valley Sun. Mr. Deane, the author of that letter, was not requested or allowed to attend the meeting and was not able to offer a response or explanation. See Union Exhibit 39 and Affidavit of Lyle Deane.

65. On April 10, 2012 the Town Administrator sent the following letter to Mr. Deane:

Please find attached a copy of a letter to the editor that appeared in the April 4, 2012 edition of *The Suncook Valley Sun* from a person named Henry Thomas. The Board of Selectmen at its recent meeting requested that I contact you with regard to the letter.

One, or more, members of the Board of Selectmen have been lead to believe that you are the ghost writer for the letter to the editor submitted by Henry Thomas. I would appreciate if you would respond and clarify the matter as soon as possible.

See Union Exhibit 15 (emphasis in original). In response, Mr. Deane advised the Town Administrator to speak to the Union's attorney.

66. The letter to the editor from "Henry Thomas of Pittsfield" provides as follows:  
Pittsfield Selectwoman Linda Small lied. As you may remember, Small made an

amendment at the March 17 town meeting to cut \$125,000 from 2012 town budget and stated that she had a plan to cut that money and not minimize the service provided by the police, fire and highway departments. At the March 20 selectmen's meeting it was painfully obvious that she did not have a plan for how she was going to cut that money and still maintain the services vital to the town.

Don't be fooled by this wolf in sheep's clothing. She is going to harm this town rather than help. If she cuts any more money from the already under-funded departments, you are going to see a dramatic reduction in services. I don't think that this "shoot first ask questions later" approach is very effective, considering in the end it is the well-being of the people and property of Pittsfield that is at risk.

I urge you to go to a selectmen's meeting and voice your opinion.

See Union Exhibit 16. According to Mr. Deane, he wrote the letter because he felt that taxpayers and residents of the Town needed to know what the potential impact of the BOS decisions would be. He wrote this letter under an assumed name because he feared retaliation from the BOS.

67. During regular BOS meetings several Town residents expressed concerns regarding effects of the BOS Directive on Town services, particularly on Police, Fire, and Ambulance coverage. See Union Exhibits 38 & 39.

68. The BOS formally adopted the "communications policy" on April 10, 2012. The policy provides in part as follows:

**B. Impact of Communication Releases**

1. A consequence to the public's accessibility to employee communications may, at the unintended time, be misinterpreted, misunderstood, and possible [sic] unintentionally uncomplimentary to fellow employees, officials or the public generally.
2. It is therefore incumbent upon all employees to view all of their communications, written or otherwise as being available for public viewing.

**C. Management of Communication Releases.**

Communication that is anticipated to be shared with media outlets (video, audio, written) shall be reviewed by the Board of Selectmen or its designee prior to release to ensure that the impacts noted in Section B. are avoided.

See Union Exhibit 26.

69. After the adoption of the "communication policy," bargaining unit employees formed a Public Relations (PR) committee that allowed employees to express their concerns about the changes in terms and conditions of employment without exposing individual employees to

possible retaliation. The PR committee published an ad in the Suncook Valley Sun to that effect. See Union Exhibit 29.

70. One of the concerns raised by bargaining unit employees with the BOS regarding the new “communications policy” was that employees, including the Police Chief and the Fire Chief, would not be able to communicate with the media and the public in the event of an emergency.

71. The BOS rescinded the “communications policy” on April 20, 2012.

**Decision Summary:**

The Town committed an unfair labor practice, when contrary to the parties’ CBA, it unilaterally prohibited department heads from assigning open shifts to full time employees and directed that open shifts be assigned to part time/per diem employees first; when it unilaterally prohibited Police Department employees from working paid details; and when it issued a policy prohibiting Town employees from communicating with the public and media without the BOS’s prior approval. The Union’s evidence is insufficient to establish that the Town committed an unfair labor practice when it changed work schedule of Police and Ambulance Department employees and this claim is, therefore, dismissed.

**Jurisdiction:**

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

**Discussion:**

**I. Count I.**

The Union claims, inter alia, that the Town violated 273-A:5, I (e), (g), (h), and (i) by issuing a Directive prohibiting overtime and police details and by unilaterally changing the work schedule of Police and Ambulance Department employees.

RSA 273-A:5, I provides in relevant part:

It shall be a prohibited practice for any public employer: (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;.. (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit ... (g) To fail to comply with this chapter or any rule adopted under this chapter; (h) To breach a collective bargaining agreement; (i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer ...

Collective bargaining between an employer and its employees fosters the goal of “avoiding strife among employers and employees by establishing terms and conditions governing the employment relationship.” See *Appeal of the State of New Hampshire*, 147 N.H. 106, 109 (2001). RSA 273-A:3, I provides in part that “[i]t is the obligation of the public employer and ... the exclusive representative of the bargaining unit to negotiate in good faith.” The Supreme Court has recognized that “[a] public employer’s unilateral change in a term or condition of employment ... is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations.” *Appeal of Hillsboro-Deering Sch. Dist.*, 144 N.H. 27, 30 (1999). RSA 273-A:1, XI defines “terms and conditions of employment” as follows:

wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase ‘managerial policy within the exclusive prerogative of the public employer’ shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer’s organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

“A CBA is a contract between a public employer and a union over the terms and conditions of employment. When parties enter into a CBA, they are obligated to adhere to its terms, which are the product of their collective bargaining.” *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006) (citations and quotation marks omitted). In interpreting a CBA, a court begins “by focusing upon the language of the CBA, as it reflects the parties’ intent. This intent is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases.” See *Appeal of Nashua Police Commission*, 149 N.H. 688, 690 (2003) (citations and quotation marks omitted).” Absent fraud, duress, mutual

mistake, or ambiguity, the search for the parties' intent must be restricted to the words of the contract. See *Appeal of Town of Durham*, 149 N.H. 486, 487 (2003). A contractual clause is ambiguous "when the contracting parties reasonably differ as to its meaning." *Appeal of Nashua Police Commission*, supra, 149 N.H. at 690.

Past practice and other extrinsic evidence may be examined to discern the intent of the parties where the language of a CBA is ambiguous or "the contract is entirely silent." See *AFSCME Local 3657, Hillsborough County Sheriff's Office v. Hillsborough County*, PELRB Decision No. 2012-117. See also *Appeal of N.H. Dep't of Safety*, 155 N.H. 201, 208-09 (2007).

An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long standing, rather than random or intermittent, become terms and conditions of [union] employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding.

*Appeal of New Hampshire Department of Corrections*, Supreme Court No. 2011-639, 2012 N.H. Lexis 136 (October 30, 2012) (citation and internal quotation marks omitted). To establish a past practice, a party must show that the alleged practice "occurred with such regularity and frequency that employees could reasonably expect [it] to continue or reoccur on a regular or consistent basis. In addition, [i]t is implicit in establishing a past practice that the party which is being asked to honor it ... be aware of its existence." *Id.* (Citation and internal quotation marks omitted.)

#### **A. Overtime**

In this case, the evidence supports the Union's claims that the Town breached the parties' CBA, refused to negotiate in good faith, and adopted a regulation/rule relative to terms and conditions of employment that invalidated the CBA when it prohibited department heads from assigning overtime/open shifts to full time employees. Overtime is often created when a shift, or part thereof, opens up due to a scheduled or unscheduled vacation, sick or other leave. The CBA Article 16 language concerning assignment of overtime/open shifts is unambiguous and requires that the Town first exhaust a department seniority list and a general seniority list before utilizing

temporary employees “when the need arises for additional Employees.” Although the CBA does not require that the Town provide a certain number of overtime hours to each bargaining unit employee, it does require that the Town offer overtime/open shifts “on a rotating basis by seniority.” Temporary and on call part time/per diem employees are not covered by the CBA and not on seniority lists. See RSA 273-A:1, IX (d). Therefore, the Town’s Directive stating that the open shifts “shall only be filled by a part time or per diem employee” is clearly contrary to the language of the CBA and it ignores, or unilaterally terminates, a contractual requirement to offer overtime/open shifts “on a rotating basis by seniority.” Moreover, even if the Article 16 language were ambiguous, the evidence here proves the existence of a long standing past practice of offering open shifts to full time bargaining unit employees first. For a long period of time and with the knowledge and acceptance of both parties, overtime/open shifts were offered to part time or per diem employees only if no full time employee was available. Therefore, directing department heads to offer open shift to part time/ per diem or temporary employees first is inconsistent with the express terms of the CBA and with past practice between the parties.

The Town’s argument that the BOS’s action was authorized under the Management Right provision of the CBA is without merit. Article 3 of the CBA provides in part that the Town “retains the right to adopt, change, enforce or discontinue any rules, regulations, procedures, policies, ordinances and law *not in direct conflict with any provision of this Agreement, or existing applicable statutory laws ...*” Similarly, Article 9 allows the Town to “prepare, issue and enforce ordinances, rules and regulations, orders ... that are necessary for the safe, orderly, cost effective, and efficient operation of the Town and its various Departments and *which are not inconsistent with this Agreement.*” As stated above, the Directive prohibiting assignment of open shifts/overtime to full time employees is inconsistent with, and in direct violation of, the overtime/seniority provision of the CBA and RSA 273-A provisions requiring that the parties bargain in good faith and abide by the terms of their agreement.

For the foregoing reasons, the Town's Directive concerning overtime constitutes a breach of the parties' CBA in violation of RSA 273-A, I (h). Furthermore, it also constitutes a unilateral change in terms or/and conditions of employment established by the CBA and past practice. The parties negotiated overtime provisions of the CBA and Town never suggested during negotiations that it intended to prohibit overtime or change the manner of its assignment. The bargaining unit employees agreed to the increased health care contribution rates and agreed to forego step and other increases based, in part, on the availability of overtime as part of their wages. The CBA has been ratified by the Union and approved by the voters at the Town Meeting as written. Thereafter, the new BOS unilaterally prohibited department heads from assigning overtime/open shifts to full time bargaining unit employees. Courts have consistently held that "such items as overtime pay, extra duty pay, vacation and holiday pay, bonus or merit pay, severance pay, shift differentials, and pensions are mandatory subjects of bargaining encompassed within the term 'wages.'" See *Appeal of Berlin Educ. Ass'n, NHEA/NEA*, 125 N.H. 779, 783-84 (1984). See also *Brampton Woolen Company v. Local Union 112*, 95 N.H. 255, 257 (1948).

Overtime pay is a component of wages and the primary effect of the Town's actions in this case was to reduce employees' wages. Proposals and actions that primarily affect wages or hours are mandatory subjects of bargaining. See *Appeal of Nashua Police Commission*, supra, 149 N.H. at 692. See also *Appeal of Hillsboro-Deering Sch. Dist.*, supra, 144 N.H. at 32; *Appeal of City of Nashua Bd. of Educ.*, 141 N.H. 768, 775 (1997). Therefore, the Town cannot unilaterally change overtime arrangements that have been established by a CBA and/or past practice. In this case, the Town's actions regarding overtime constitute a unilateral change in terms and/or condition of employment and are, therefore, a refusal to bargain in good faith in violation of RSA 273-A:5, I (e). In addition, the Town's Directive concerning overtime violates RSA 273-A:5, I (i) and (g) because it invalidates the overtime/seniority provision of the parties' CBA and because the failure to bargain in good faith also constitutes a failure to comply with RSA 273-A:3, I.

For the foregoing reasons, the Town committed an unfair labor practice in violation of RSA 273-A:5, I (e), (g), (h), and (i) when it prohibited assignment of overtime/open shifts to full time bargaining unit employees and directed department heads to assign open shifts to part time/per diem or temporary employees.

**B. Police Detail.**

The Union also claims that the Town unilaterally changed bargaining unit employees' terms and conditions of employment when it prohibited police department employees from working details. Detail work, like overtime, is a component of wages and the Town's actions prohibiting police detail work primarily affect employees' wages. See *Appeal of Berlin Educ. Ass'n, NHEA/NEA*, supra, 125 N.H. at 783-84. Therefore, police detail work is a term or condition of employment and a mandatory subject of bargaining which cannot be unilaterally changed by the Town. See RSA 273-A:1, XI. See also *Appeal of Nashua Police Commission*, supra, 149 N.H. at 692. In addition, the Town cannot unilaterally change a term or condition of employment established by a binding past practice. See *Appeal of New Hampshire Department of Corrections*, supra, Supreme Court No. 2011-639, 2012 N.H. Lexis 136.

In this case, there is a long standing past practice of Town's Police Department employees performing detail work. Police Department employees, including Sergeants and the Police Chief, worked details on a regular and consistent basis for several years. In fact, in 2011 the Town's gross revenue from police details was \$79,614.28 and full time Police Department employees, including Sergeants and the Police Chief earned \$36,661.72 working details. Specifically, between March 21, 2011 and July 1, 2011 Sgt. Cain earned \$2536.00 in details wages, while Sgt. Walter and Chief Wharem earned \$264.00 and \$1172.00, respectively. The Town Administrator and the BOS were aware of the practice<sup>1</sup>. Based on the foregoing, there exists a long standing past

---

<sup>1</sup> For example, at the Town Meeting Selectman Small acknowledged that the police detail revenue helped the Town significantly and that in 2011 the details generated almost \$80,000 in revenue. See Findings of Fact at 37.

practice of Town's Police Department employees working details and the Town violated RSA 273-A:5, I (e) when it unilaterally prohibited police detail work.

The Town's argument that its actions were justified because RSA 32:1 *et. seq.* prohibits it from expending money in excess of the amount appropriated by the Town Meeting, which in this case was set at \$1, is inapposite. RSA 32:1 *et. seq.* provides in relevant part as follows:

32:8 Limitation on Expenditures. – No board of selectmen, or any other officer, employee, or agency of the municipality acting as such shall pay or agree to pay any money, or incur any liability involving the expenditure of any money, for any purpose in excess of the amount appropriated by the legislative body for that purpose, or for any purpose for which no appropriation has been made, except as provided in RSA 32:9-11.

32:13 Contracts; Expenditures Prior to Meeting.

I. This subdivision shall not be construed to imply that a local legislative body, through its actions on appropriations, has the authority to nullify a prior contractual obligation of the municipality, when such obligation is not contingent upon such appropriations and is otherwise valid under the New Hampshire law of municipal contracts, or to nullify any other binding state or federal legal obligation which supersedes the authority of the local legislative body.

In addition, contract negotiations between unions and public employers are governed in part by RSA 273-A:3, II which provides in relevant part as follows:

(b) Only cost items shall be submitted to the legislative body of the public employer for approval at the next annual meeting of the legislative body ... If the legislative body rejects any part of the submission, or while accepting the submission takes any action which would result in a modification of the terms of the cost items submitted to it, either party may reopen negotiations on all or part of the entire agreement.

Cost item is defined as "any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted." See RSA 273-A:1, IV. "A central purpose of RSA 273-A is the identification of the 'demand' the agreement 'places upon public funds' so that voters are informed when voting on approval of a negotiated agreement." See *Teamsters Local 633 of New Hampshire (Pittsfield Police Department) v. Town of Pittsfield*, PELRB Decision No. 2012-219 (citing *Appeal of Sanborn Regional School Board*, 133 N.H. 513, 521 (1990)). In this case, police details wages are paid by private contractors, and not by the Town, and do not constitute a

demand “placed upon public funds.” In fact, in 2011 the Town received net revenue of \$23,198.81 from police detail work. Therefore, police details do not require an appropriation and are not cost items. See *Teamsters Local 633 of New Hampshire (Pittsfield Police Department) v. Town of Pittsfield*, PELRB Decision No. 2012-219.

For the foregoing reasons, the Town committed an unfair labor practice in violation of RSA 273-A, I (e) when it unilaterally prohibited bargaining unit employees from working police details.

**C. Work Schedules.**

The Union also complains that the Town committed an unfair labor practice in violation of the CBA and the past practice when it changed the Ambulance Department schedule from two 24-hour days to four 12-hour days and when the BOS, and not the department heads, set the work schedules for the Police and Ambulance Departments.<sup>2</sup>

The CBA provides that the “hours of work of the Police Department shall be scheduled by the Chief of Police after approval from the Town Administrator” and that the “hours of work of the Ambulance Department shall be scheduled by the Ambulance Director”, i.e. the Fire Chief, after approval from the Town Administrator. The plain meaning of the phrase “after approval from the Town Administrator” indicates that the Town Administrator’s approval is a condition precedent to the scheduling of hours by the department heads. The Town Administrator is a representative of the BOS and works at its direction. Therefore, Town Administrator’s or Board of Selectmen’s directive that the department heads prepare a new schedule does not in constitute a breach of contract.

Further, Section 1 of Article 13, titled Hours of Work, provides as follows:

Nothing contained therein shall be construed as preventing or limiting the Town from restructuring, revising, rescheduling, reassigning or otherwise changing the work day or

---

<sup>2</sup> The BOS also changed work hours for Police Department employees from four 10-hour days to five 8-hour days but the Union does not claim here that this change is the violation of RSA 273-A. Instead, the Union claims that the violation occurred when the BOS, as opposed to the Police Chief, set the Police Department schedule.

work week for the purposes of promoting efficiency and effectiveness, meeting the needs of public safety, promoting the public welfare, limiting costs and expenses, and administering to the need of the community during periods of public emergency.

Absent fraud, duress, mutual mistake, or ambiguity, the determination of the parties' intent is restricted to the words of the contract. See *Appeal of Town of Durham*, supra, 149 N.H. at 487. The language of this provision is clear and unambiguous and expressly reserves to the Town the right to reschedule or otherwise change the work day or work week of the Town employees. The evidence here is insufficient to establish the existence of fraud, duress or mutual mistake. In addition, the change in the Ambulance Department schedule does not violate Article 14, Section 2 of the CBA (stating that Ambulance Department schedule can be changed to 48-hour week after consultation with Union), because the length of the work week has not been changed in this case. The Ambulance Department employees have been working 48 hours per week under the previous schedule for a number of years and the new schedule does not change the total number of hours worked per week. Also, the CBA does not expressly set the Ambulance Department work schedule at two 24-hour days a week but instead provides that the normal workday of the Ambulance Department employees "may vary from eight (8) hour shifts to sixteen (16) hour shifts and from a forty (40) hour workweek to a forty-eight (48) hour workweek at straight time." Therefore, neither Article 14 nor any other contractual provision can outweigh the clear and unambiguous mandate of Article 13, Section 1 reserving to the Town the right to change work day and work week of Town employees.

For the foregoing reasons, the Town did not breach the parties' CBA when it changed the Ambulance Department schedule from two 24-hour days to four 12-hour days. The evidence is also insufficient to establish that the Town has failed to bargain in good faith with respect to Article 13 of the CBA. Accordingly, the Union's claim that the Town committed an unfair labor practice when it unilaterally changed the Ambulance Department work schedule and when it set schedules for the Police and Ambulance Departments is dismissed. The evidence is also

insufficient to support the Union's claim that the Town breached the parties' CBA when it failed to notify the Union of changes in the hours of work and to post the order regarding the change in schedule in accordance with Article 13, Section 2 and Article 9. Accordingly, this claim is dismissed.

## II. Count II

The Union claims that the Town's policy prohibiting bargaining unit employees from communicating with the public without the BOS's prior approval constitutes an interference with the employees' rights in violation of RSA 273-A:5, I (a) and RSA 98-E. The Town counters that the Union's claim is moot because the Town rescinded its policy on April 20, 2012.

"The Union's and bargaining unit employee's self-determination rights protected under the statute ... are an integral part of the right of public employees to organize and act collectively in the RSA 273-A bargaining process." See *AFSCME, Council 93, Local 3657/Milford Police Employees v. Town of Milford*, PELRB Decision 2011-084. In the *Milford* case, the PELRB held that these rights include:

[T]he right of the Union and bargaining unit employees to conduct their internal affairs and administer and conduct Union business and operations without unsolicited advice, instruction, criticism and other intrusions by [a public employer] designed to influence and change how such affairs are conducted. They include the right to determine when, where and how to respond to the [public employer's] comments made at [a public meeting]. They include the right of bargaining unit employees to decide the nature and extent of their involvement in Union business and activity, if any ...

See *id.* These rights also include the right to advocate its position regarding the changes to terms and conditions of employment before the members of the legislature of a public employer, such as Town Meeting voters. In the *Hillsboro-Deering* case, in which a public employer representative expressed his opposition to the union members' vote of "no confidence" during a mandatory faculty meeting attended by union members, the PELRB found that the public employer's remarks violated RSA 273-A:5, I (a). See *Hillsboro-Deering Federation of Teachers, AFT Local #2348, AFT-NH, AFL-CIO v. Hillsboro-Deering School District*, Decision No. 2008-175. The

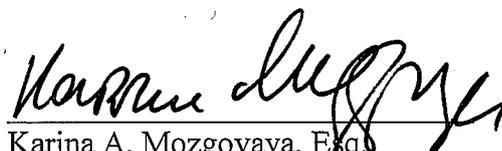
PELRB held that RSA 273-A:5, I (a) prohibits the public employer from interfering with employees' actions in support of what they believe to be an improvement in their working conditions and protects employees from being subjected to statement by public employer that could be reasonably foreseen to result in intimidation. See *id.*

In this case, the "communication policy" was publicly discussed by the BOS during March 20, 2012 meeting and was not rescinded until April 20, 2012. On April 3, 2012 the BOS discussed a newspaper article written by a bargaining unit member regarding the effects of the BOS's Directive on the public and employees and the BOS questioned that employee on April 10, 2012. The BOS members continued to discuss "decorum" during the meetings held after March 20, 2012. Although formally adopted on April 10, 2012, in practice, the policy was in effect for a month. The BOS is commended for rescinding the policy. Nevertheless, this action does not nullify the negative effect on bargaining unit employees' rights under RSA 273-A. The evidence shows that bargaining unit employees reasonably believed the "communications policy" to be effective March 20, 2012 and reasonably felt coerced and intimidated. Some bargaining unit employees changed their behavior in terms of their communication with the Town voters and the BOS as a result of the BOS's actions because they feared retaliation if they publicly expressed their views concerning the changes in the terms and conditions of their employment. The BOS's actions interfered with the bargaining unit employees' right to advocate their or the Union's position regarding the changes to terms and conditions of employment and their right to be free from intimidation or coercion by the public employer in exercise of their statutory rights. For the foregoing reasons, the Town violated RSA 273-A:5, I (a) when it enacted a policy prohibiting employees from communicating with the public without prior approval by the BOS. The PELRB has no jurisdiction over the Union's claim of violation of RSA 98-E and this claim is, therefore, dismissed.

Accordingly, as discussed above, the Town committed an unfair labor practice when it prohibited assignment of overtime/open shifts to full time employees and directed department heads to assign open shifts to part time/per diem or temporary employees first; when it prohibited police detail work; and when it issued a policy prohibiting employees from communicating with the public and media without prior approval by the BOS. The Union's claims related to work schedule changes and posting of the Town's directives, and all other claims to the extent they have been asserted, are dismissed. The Town shall cease and desist enforcing sections #2 (overtime) and #3 (police details) of its March 21, 2012 Directive and shall make overtime/open shifts and detail work available to employees in accordance with this decision. The Town shall make all affected bargaining unit employees whole for lost overtime and detail hours. The Town shall cease and desist from any activity, including the development and enforcement of any policy, that would prohibit bargaining unit employees' communications with the public or media on issues related to collective bargaining or the terms and conditions of their employment.

So ordered.

December 26, 2012

  
Karina A. Mozgovaya, Esq.  
Staff Counsel/Hearing Officer

Distribution:

Terri D. Donovan, Esq.  
Paul T. Fitzgerald, Esq.